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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5937

VENTURA YBARRA,

Appellant

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT

SECOND JUDICIAL DISTRICT

MOTION TO DISMISS

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ARGUMENT

I.

THE DECISION OF THE APPELLATE COURT OF ILLINOIS IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The only issue before this Court is whether the search of appellant's person pursuant to chapter 38, section 108-9 Illinois Revised Statutes was reasonable. The statute reads as follows:

> "In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack, or
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The Appellate Court of Illinois noted that four States have similar statutes. In fact, eight States[1] in addition to

[1] Conn. Gen. Stat. Rev., §54-33b, D.C. Code, §23-524(g); Ga. Code Ann., §27-309; Kan. Stat. Ann., §22-2509; Mont. Rev. Code Ann., §95-710; Nev. Rev. Stat., §179.055; N. Y. Crim. Pro. Law, §690.15; Wis. Stat. Ann., §968.16.

Illinois, authorize this type of police action and three other States[2] grant this power through a specified form of warrant.

The rationale behind these statutes is a recognition by the various state legislatures of two important needs: to safeguard the police from physical attack while they execute a search warrant, and to preserve the small and easily concealable evidence of illegal gambling and narcotics violations. The Committee Comments of the Illinois Statute explain that the legislature is concerned with affording the searching officers with protection when they need it most, upon first arriving at the scene of the premises to be searched. Also pointed out in the Committee Comments is that the power is "parasitic to the warrant [and] should not be considered excessive in the hands of the executing officer" and the need "arises most often in the narcotics cases ...."

It is axiomatic that not all searches and seizures are prohibited by the Fourth Amendment, but only unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643 (1961); Harris v. United States, 331 U.S. 145 (1947). In Ker v. California, 374 U.S. 23 (1963) this Court said of the reasonableness standard of the Fourth Amendment: "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective law enforcement in the States, ..." 374 U.S. 23, 34.

In assessing the ultimate standard of reasonableness each case must be determined on the basis of its own particular

[2] Del. Code Ann., Title 11, §2310; Mass. Gen. Laws, Ann., ch. 276, §2A; N. H. Rev. Stat. Ann. §696-A:3.

facts. Cady v. Dombrowski, 413 U.S. 433, 439 (1973); Cooper v. California, 386 U.S. 58 (1967).

In the instant case we see first, a valid search warrant authorizing the entry of police authorities; second, the property to be seized is fully described in the warrant and it is specifically limited to evidence of narcotics violations; third, the appellant was physically present when the police arrived at the place set forth in the search warrant; and fourth, based upon the facts of the case it was reasonable to believe that the appellant had evidence of narcotics violations on or about his person. Otherwise stated, there was a well founded suspicion or belief that the defendant was a participant in an ongoing criminal offense, namely, narcotics traffic.

Appellant contends that there is no basis in the record for the Illinois Appellate Court to have concluded that the allegation was made in the affidavit that the bar was frequented by persons illegally purchasing drugs. But an affidavit in support of a search warrant must be read in a common sense, not hypertechnical fashion. United States v. Ventresca, 380 U.S. 102, 108 (1965). Considerable latitude should be permitted for reasonable inferences from the facts stated. It was sufficiently clear that the bartender "Greg", was transferring heroin to persons who frequented the Aurora Tap. Upon entering the tavern, the officer saw about a dozen persons. The search warrant made it evident that the bartender would have heroin for sale on that day. The informant had recently observed a quantity of fifteen to twenty packets of heroin on the person of the bartender of the tavern described by Special Agent Johnson as a very dismal, drab, very plain, almost shabby type of establishment (R.31). Under the circumstances, it was reasonable for the police to infer that the persons in the tavern were actually on the

premises to purchase narcotics. Consider the serious nature of the crime suspected; consider the nature and character of the premises, its size and purpose; finally consider the difficulty of providing a specific detailed description of the whereabouts of the places to be searched and the slight risk that innocent people would be subject to the search.

Appellant, whose guilt is plain, seeks to exact a substantial cost to society's interest in effective law enforcement. He seeks, without justification, to keep reliable evidence from the view of justice. This Court has commented on the impact of the exclusionary rule in the quest for truth. United States v. Ceccolini, 435 U.S. 268, 275 (1978); Stone v. Powell, 428 U.S. 465, 489 (1976); United States v. Calandra, 414 U.S. 338, 350 (1974).

The State acknowledges that there are obvious limitations to the authority of police officers. It is not contended that the police could search a person on the pretext of seeking large items, such as a stolen television set, enumerated in a search warrant. See, Rauh and Silbert, Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970, 20 Am. U. L. Rev. 252 (1970). Nor is it contended that the authority to search the person found on the premises, under circumstances such that he would reasonably be expected to have concealed contraband on his person, would extend beyond the place specified in the search warrant. The authority to search a place designated in a warrant does not include additional or different places. Kleiningham v. United States, 109 U.S. App. D.C. 272, 287 F.2d 126, 129 (1960).

The dicta in United States v. Di Re, 332 U.S. 581 (1948) cited by appellant, does little to advance his position. There this Court invalidated a warrantless search of an automobile passenger whose only connection with the underlying

offense of sale of counterfeit ration coupons was his presence in the automobile at the time that the driver transferred the coupons to a government agent. In Di Re, supra, the government apparently conceded that it would not condone a search of all persons present in a residence based solely upon a search warrant for those premises.

Needless to say, analogous factual situations have been considered by the courts. Chief Justice Weintraub of New Jersey in a cogent opinion, upheld the practice of a search of all persons present on the premises in State v. De Simone, 60 N.J. 319, 288 A.2d 849 (1972). Under the De Simone rationale, this power given to the police, hinged upon the valid search warrant, is tested after the fact by a motion to suppress. The facts in De Simone were essentially that a warrant had been issued to search a specific automobile "and all persons found therein" for gambling paraphernalia. The automobile had been observed to be an instrument in a so-called "lottery drop." Search of the defendant, a passenger in the automobile, revealed lottery slips on his person. There the court observed that "so long as there is good reason to believe that anyone present at the anticipated scene will probably be a participant, presence becomes the descriptive fact satisfying the aim of the Fourth Amendment." 288 A.2d 849, 850.[3]

As noted in the opinion of the Illinois Appellate Court, the Supreme Court of Kansas in State v. Loudermilk,

[3] In support of the proposition of law that the defendant was properly subject to search where he can be seen to have had a physical nexus to the ongoing crime is cited, inter alia, Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970) which sustained a Georgia statute similar to that of Illinois in a situation involving persons in an apartment where drugs were sold; Johnson v. State, 440 S.W.2d 308 (Tex. Cr.App. 1969) which involved a search of an apartment where "pot" parties were commonplace; and People v. Nicoletti, 60 N.Y.Misc. 2d 108, 302 N.Y.W.2d 618 (1969) which concerned the search of persons found on the first floor of a specified premises wherein a dice game was operating.

208 Kan. 893, 494 P.2d 1174 (1972) upheld a state statute with provisions comparable to the contested Illinois statute. Beginning with the observation that the statute provides for only "reasonable" detention and search, the court announced that it was constitutional on its face. The court then examined two Illinois decisions which have recognized that an immediate search of persons present on the premises to be searched pursuant to a warrant is essential both to secure the premises and to execute the warrant. It considered People v. Pugh, 69 Ill.App.2d 312, 217 N.E.2d 557 (1st Dist., 1966), which involved a search for narcotics under a warrant for the apartment of the defendant's brother. While the officers were executing the warrant the defendant rang the doorbell, was admitted, and the police searched his pants pocket to discover a quantity of heroin. In Pugh, supra, the court reasoned that the execution of search warrants in narcotics cases is a "risky business at best." (In accord with Pugh, supra, is People v. Kielczyski, 130 Ill.App.2d 231, 264 N.E.2d 767 (1st Dist., 1970); People v. Harrison, 83 Ill.App.2d 90, 226 N.E.2d 418 (1st Dist., 1967)). Two years later in State v. McClelland, 215 Kan. 81, 523 P.2d 357 (1974) the court re-affirmed its belief that the Kansas statute did not offend the Fourth Amendment.

The District of Columbia upheld their statutory provision in United States v. Graves, 315 A.2d 559 (1974). There the factual setting parallels the case at bar. A search warrant was issued for evidence of illegal gambling in a small delicatessen. About a half dozen persons were found on the premises and searched by the police. Gambling slips were found on the person of the defendant. The court in Graves, supra, rejected the notion that the statute would authorize the search of a large number of persons present in a supermarket or a large department store where there is absolutely

no nexus between them and the articles constituting the object of the search. In Graves, supra, the police officers had the benefit of an informant's tip that the persons inside the delicatessen at the time were not mere patrons but participants in illegal gambling. In the instant case the affiant stated unequivocally that his informant had advised him that the bartender, "Greg," would be selling heroin at the place and time in question. We submit that it is not unreasonable to believe that the bartender might have sold heroin to the several persons present in this shabby one room tavern. Surely the law is not so impotent as to permit the objects of a judicially ordered search to be carried off under the nose of the police. Olympia v. Culp, 136 Wash. 374, 377, 240 P. 360, 361 (1925).

Other states, without the benefit of legislative action, have passed on the question of the search of all persons with a connection to the premises to be lawfully searched. The Texas courts have held that the police authorities not only have the right to search persons found on the premises in the execution of a search warrant but that they have the affirmative duty to do so. Brown v. State, 498 S.W. 2d 343, 346; (Tex. Cr. App., 1973) and cases cited therein.

In Samuel v. State, 222 So.2d 3 (Fla., 1969), the Supreme Court of Florida considered the validity vel non of a search warrant which authorized the search of a building as well as all persons therein who were suspected of being connected with the illegal activity of gambling. As said by the court:

> "It would obviously be difficult if not impossible to identify in advance all the persons in a gambling establishment who might

be guilty of a violation of the gambling laws."

222 So.2d 3, 5 (1969)[4]

This Court has previously considered the possibility that evidence may be lost as one exigent circumstance justifying a warrantless search. Schmerber v. California, 384 U.S. 757, 770-7 (1966); Preston v. United States, 376 U.S. 364, 367 (1964). A fortiori the law cannot countenance the object of a judicially approved search such as this to be so easily frustrated as appellant would have it.

[4] See also: Commonwealth v. Smith, Mass. 348 N.E.2d 101 (1976) cert. denied 429 U.S. 944; State v. Halverson, 21 Wash.App. 35, 584 P.2d 408 (1978) and cases cited therein; State v. Procce, 5 Conn. Cir. 637, 260 A.2d 413 (1969); Thomas v. United States, 352 A.2d 390 (1976) citing with approval People v. Graves, infra; and Walker v. United States, 327 F.2d 597 (D.C. Cir., 1963), cert. denied 377 U.S. 956 (1968) in which it was held that a search warrant for premises will authorize a search of objects held in the hand of a person found on the specified premises.

CONCLUSION

WHEREFORE, it is respectfully urged that the appeal be dismissed.

Respectfully submitted,

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